

CAUSE NO. PD-0474-19

IN THE  
THE COURT OF CRIMINAL APPEALS  
FOR THE  
STATE OF TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
2/6/2020  
DEANA WILLIAMSON, CLERK

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JAMES RAY PENDERGRAFT,

PETITIONER

V.

THE STATE OF TEXAS,

RESPONDENT

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**STATE'S BRIEF ON THE MERITS**

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through the undersigned Assistant Criminal District Attorney, and respectfully urges this Court to uphold the opinion of the Court below.

**STATEMENT REGARDING ORAL ARGUMENT**

The Court ruled that no oral argument will be taken when it granted discretionary review in this matter.

## **STATEMENT OF PROCEDURAL HISTORY**

Petitioner, James Ray Pendergraft, was originally indicted in Cause No. 007-1264-17, in the 7<sup>th</sup> District Court of Smith County, Texas, with the offense of Aggravated Assault. (1 CR: 1). In March of 2018, Petitioner, with counsel, pleaded not guilty and a jury trial was held. After hearing evidence and argument of counsel, the jury found Petitioner guilty as charged by the indictment. (12 RR: 96). During the punishment phase, the trial court, having heard evidence and argument of counsel, imposed a sentence of thirty-five years with no fine. (13 RR: 23).

Petitioner appealed and on April 17, 2019, the 12<sup>th</sup> Court of Appeals, in an unpublished decision, affirmed the conviction and sentence. *Pendergraft v. State*, No. 12-18-00091-CR, 2019 Tex. App. LEXIS 3133 (Tex. App. - Tyler, April 17, 2019) (not designated for publication).

On October 23, 2019, this Court granted discretionary review. On January 8, 2020, Petitioner filed his brief on the merits with the Court. The State's brief on the merits will be timely filed if postmarked on or before February 7, 2020.

## **STATEMENT OF THE FACTS**

Petitioner, was convicted of beating his wife and using a baseball bat as a deadly weapon during the assault. (1 CR: 66-68). The indictment further alleged that Petitioner had a prior felony conviction for driving while intoxicated. (1 CR: 2).

Petitioner appealed. The trial court granted his request for a free reporter's record. (1 CR: 80).<sup>1</sup> On September 10, 2018, his court-appointed attorney filed an *Anders* brief asserting that there were no non-frivolous errors to raise in the 12<sup>th</sup> Court of Appeals.<sup>2</sup> Along with the *Anders* brief, Petitioner's attorney filed a motion to withdraw, certifying that he had informed Petitioner of his right to file a *pro se* brief in the case. *See Pendergraft*, 2019 Tex. App. LEXIS 3133 at \*2 fn.3. The following events then occurred in this order:

**October 3, 2018** - Petitioner filed for an extension of time to file his *pro se* brief in the 12<sup>th</sup> Court and asserted among other matters, that he "has no records to review to file a brief." (State's Brief: Appendix A).

**October 8, 2018** - Petitioner's appellate attorney filed with the 12<sup>th</sup> Court "Appellant's Motion to Obtain Record" seeking a remand to the trial court, "to allow James Pendergraft a copy of the record..." (State's Brief: Appendix B).

**October 10, 2018** - The 12<sup>th</sup> Court issued an order to the trial court to make the reporter's record available to Petitioner. (1 CR Supp I: 1, 6).

**November 12, 2018** - The trial court issued findings of fact showing that Petitioner was allowed to view the appellate record on October 29, 2018. (1 CR Supp I: 4). The trial court noted that it would send a free copy of the appellate record to Petitioner's TDCJ-ID unit, "for his use on said appeal." *Id.*

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<sup>1</sup> There are three volumes of Clerk's Record in this case. The original will be notated as "(1 CR: x)." Two supplemental volumes were prepared and will be notated as "(1 CR Supp I: x)" and "(1 CR Supp II: x)."

<sup>2</sup> *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

**December 19, 2018** - Petitioner's appellate counsel filed a "Motion to Extend Time to file Appellant's Pro Se Brief" with the 12<sup>th</sup> Court. This motion asserted that, although the trial court sent the record to the Gurney Unit, Petitioner did not receive it. Counsel asked for an order telling the trial court to send the record and requested 30 days from receipt of the record to file a *pro se* brief. (Pet. Brief: Appendix C).

**December 21, 2018** - The 12<sup>th</sup> Court granted Petitioner's attorney's request and entered an order that the trial court "shall ensure that Appellant receives an electronic copy of the appellate record" by December 31, 2018. (1 CR Supp II: 5).

**December 28, 2018** - The trial court informed 12<sup>th</sup> Court that it had mailed "an electronic copy of the appellate record" to the TDCJ-ID Gurney Unit for Petitioner's use. (1 CR Supp II: 9).

**December 31, 2018** - The 12<sup>th</sup> Court issued notice of the trial court's letter and granted an extension of time for petitioner's *pro se* brief until January 30, 2019. (State's Brief: Appendix C).

**January 30, 2019** - Instead of filing his brief, Petitioner filed a letter in the 12<sup>th</sup> Court, apparently written by another TDCJ inmate, explaining that Petitioner received a package from the trial court but that prison officials seized the CD's containing the appellate record and will not allow him to access those CD's by way of a computer. (Pet. Brief: Appendix A). The same letter requested that Petitioner be provided with a paper copy of the appellate record to comply with TDCJ rules. *Id.* The letter did not seek an extension of time to file a *pro se* brief. *Id.*

**February 20, 2019** - The 12<sup>th</sup> Court issued notice that Petitioner's request for a paper copy of the record is overruled for failing to comply with Rule 9.5 of the Rules of Appellate Procedure ("Service of All Documents Required"). (Pet. Brief: Appendix D).

**March 18, 2019** - The 12<sup>th</sup> Court noticed to all parties that the case will be submitted without oral argument on April 8, 2019. (State's Brief: Appendix D).

**April 17, 2019** - The 12<sup>th</sup> Court affirmed Petitioner's conviction. *Pendergraft v. State*, No. 12-18-00091-CR, 2019 Tex. App. LEXIS 3133 (Tex. App. - Tyler, April 17, 2019) (not designated for publication). No motion for rehearing was filed.

**May 9, 2019** - This Court's granted Petitioner's request for an extension of time to file his petition for discretionary review, making said petition due on July 16, 2019.

**June 19, 2019** - Petitioner sent a letter to the 12<sup>th</sup> Court seeking another electronic (CD's) copy of the appellate record so that a family member could make a paper copy of the record to assist in filing a PDR. (Pet. Brief: Appendix D).

**June 27, 2019** - The 12<sup>th</sup> Court sent a letter to Petitioner detailing the cost of a paper copy of the record. (Pet. Brief: Appendix E).

**July 2, 2019** - Petitioner sent another letter to the 12<sup>th</sup> Court asking that he be sent a copy of "documents" which includes the appellate record and stating that his TDCJ Unit will not allow him to have "access to CD's." (State's Brief: Appendix E).

**July 24, 2019** - This Court granted Petitioner's request for an extension of time to file his PDR, making it due August 15, 2019.

**August 21, 2019** - Petitioner files his *pro se* PDR with this Court.

The facts of this case establish that the 12<sup>th</sup> Court granted every properly filed request that Petitioner made regarding extending the time to file his *pro se* brief and having access to the appellate record.

The same facts show that Petitioner did not file a properly serviced request for a free paper record until after the 12<sup>th</sup> Court had affirmed his conviction.

**I. This Court's discretionary review jurisdiction is limited to "decisions" of the Courts of Appeal and there is no reviewable "decision" in this case.**

As a preliminary matter, the State respectfully suggests that the facts in this case do not show that the 12<sup>th</sup> Court ever issued a reviewable "decision" on whether Petitioner was entitled to a paper copy of the appellate record. Instead, what the record shows is that:

On October 3, 2018, Petitioner sought an extension of time to file his *pro se* brief in the 12<sup>th</sup> Court and claimed that he had no access to the appellate record. (State's Brief: Appendix A). In response to this motion, on October 10, 2018, the 12<sup>th</sup> Court issued an order to the trial court to make the reporter's record available to Petitioner. (1 CR Supp I: 1, 6).

On December 19, 2018, Petitioner's appellate counsel filed a "Motion to Extend Time to file Appellant's Pro Se Brief" with the 12<sup>th</sup> Court and explained that, although the trial court sent the appellate record to the Gurney Unit, Petitioner did not receive it. Counsel asked for an order telling the trial court to send the record and requests 30 days from receipt of the record to file a *pro se* brief. (Pet. Brief: Appendix C). On December 21, 2018, the 12<sup>th</sup> Court granted counsel's request and entered an order that the trial court "shall ensure that Appellant receives an electronic copy of the appellate record" by December 31, 2018. (1 CR Supp II: 5). After the trial court noticed the 12<sup>th</sup>

Court that it had sent the record to Petitioner's TDCJ unit, on December 31, 2018, the 12<sup>th</sup> Court granted Petitioner's request for an extension for the filing his *pro se* brief with the new due date set for January 30, 2019. (State's Brief: Appendix C). Petitioner did not respond to this grant of additional time in any way and did not complain that he had not yet received the record.

On January 30, 2019, instead of filing his brief, Petitioner sent a letter to the 12<sup>th</sup> Court claiming that he received the package from the trial court but that prison officials seized the CD's containing the appellate record. (Pet. Brief: Appendix A). Petitioner, for the first time, requested a paper copy of the record. *Id.* He did not ask for another extension of time to file a *pro se* brief. *Id.* On February 20, 2019, the 12<sup>th</sup> Court overruled Petitioner's request for a paper copy of the record because it does not show service on the State as required by Rule 9.5 of the Rules of Appellate Procedure. (Pet. Brief: Appendix D).<sup>3</sup> Petitioner did not respond, refile his request with proper service, or seek another extension of time to file his brief. **Petitioner's brief is now twenty-two (22) days overdue.**

On March 18, 2019, the 12<sup>th</sup> Court noticed to all parties that the case will be submitted without oral argument on April 8, 2019. (State's Brief: Appendix D).

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<sup>3</sup> In fact, none of the *pro se* filings of Petitioner, including his PDR, were served on the State.

Petitioner did not respond to this notice, did not file for an extension of time, or inform the Court that he still has not had access to the record. **Petitioner's brief is now forty-seven (47) days overdue.**

On April 17, 2019, the 12<sup>th</sup> Court affirmed Petitioner's conviction. *Pendergraft*, 2019 Tex. App. LEXIS 3133. **Petitioner's brief was seventy-seven (77) days overdue at that time.**

Consequently, the only "decisions" made by the 12<sup>th</sup> Court in the period between the filing of counsel's *Anders* brief and the issuance of its opinion were: (1) an order to the trial court to make the appellate record available to Petitioner; (2) an order to the trial court to send a copy of the record to Petitioner in prison; (3) an order granting Petitioner's motion for an extension of time; and, (4) an order overruling Petitioner's request for a paper copy of the record due to a lack of service.

The Court's decisions in (1-3) above granted Petitioner's requests and were arguably entered with the intent that he would have access to the appellate record and have sufficient time to prepare his *pro se* brief.

The decision in (4) above was not on the merits of Petitioner's motion, but rather based upon his failure to comply with the applicable rules. Petitioner did not respond to this decision in any manner after it was made and he has not attacked it now on the basis that the 12<sup>th</sup> Court incorrectly applied the appellate rules.

Thus, there was no "decision" entered by the 12<sup>th</sup> Court that directly denied Petitioner access to the appellate record. To the contrary, the 12<sup>th</sup> Court repeatedly took steps to ensure that Petitioner had access to the appellate record as contemplated by this Court. *Kelly v. State*, 436 S.W.3d 313, 318 (Tex. Crim. App. 2014).<sup>4</sup> At least, until Petitioner let the time for filing his brief lapse without a murmur.

Petitioner's failures to properly service his request for a paper copy of the record and to seek to extend the time for filing his brief, were not the result of any "decision" by the 12<sup>th</sup> Court. Neither was Petitioner's failure to respond to the 12<sup>th</sup> Court's notice that the case was going to be taken under submission.

Likewise, only after hearing absolutely nothing from Petitioner in the almost three months since it overruled his unserved request for a paper record, the 12<sup>th</sup> Court finally decided that his appeal was frivolous. Petitioner allowed the time for filing his brief to expire well before the 12<sup>th</sup> Court's opinion - even though he had been previously successful in obtaining whatever action he sought from the 12<sup>th</sup> Court.

A *pro se* defendant is bound by the same rules and requirements and is subject to the same risks and pitfalls as a professional attorney. *See Williams v. State*, 252

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<sup>4</sup> "But we believe that the courts of appeals also have an on-going responsibility, once an appellant manifests his desire for pro se record access, to officially guide the process and follow through to make sure that such access is granted before they rule on the validity of appointed counsel's *Anders* brief and motion to withdraw."

S.W.3d 353, 356 (Tex. Crim. App. 2008); *Johnson v. State*, 760 S.W.2d 277, 279 (Tex. Crim. App. 1988). It is submitted that, had an attorney let his or her brief become as seriously overdue as Petitioner's, without communicating with the appellate court, that attorney would be under the threat of contempt for failing to comply with the rules. TEX. R. APP. P. 38.8 (b); *see i.e. Gomez v. State*, No. 07-16-00156-CR, 2017 Tex. App. LEXIS 1841, at \*4 (Tex. App. - Amarillo Mar. 2, 2017, no pet.) (not designated for publication); *Moya v. State*, No. 06-12-00121-CR, 2013 Tex. App. LEXIS 2367, at \*2 (Tex. App. - Texarkana Jan. 23, 2013, no pet) (not designated for publication) ("[W]e warn appellant's counsel that his failure to timely file appellant's brief may subject him to contempt proceedings.").<sup>5</sup>

This Court has repeatedly held that its discretionary review capacity is limited to "decisions" of the courts of appeal. *State v. Moreno*, 294 S.W.3d 594, 601 (Tex. Crim. App. 2009); *Stringer v. State*, 241 S.W.3d 52, 59 (Tex. Crim. App. 2007); *Lee v. State*, 791 S.W.2d 141, 142 (Tex. Crim. App. 1990); *see also* TEX. R. APP. P. 66.1.

Respectfully, since there was no decision by the 12<sup>th</sup> Court that failed to ensure Petitioner had a copy of the appellate record, this petition may have been

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<sup>5</sup> The State offers unpublished opinions to point out the reasoning of the courts therein when faced with very similar facts "rather than simply arguing without reference, that same reasoning." *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App. - Amarillo 2003, pet. ref'd).

improvidently granted. If the Court finds that Petitioner has not slumbered on his rights or violated the rules, the State would suggest that this petition be withdrawn and that the case be remanded back to the 12<sup>th</sup> Court with instructions to withdraw its previous opinion and to take steps ensure that Petitioner has access to the appellate record before requiring him to file a *pro se* brief within thirty (30) days of receiving the record. *See i.e. Ex parte Torres*, No. AP-75,874, 2008 Tex. Crim. App. Unpub. LEXIS 207, at \*2 (Crim. App. Mar. 19, 2008) (not designated for publication).<sup>6</sup>

## **II. REPLY TO GROUND FOR REVIEW ONE**

**The Court of Appeals did not err in taking this case under submission after Petitioner failed to timely file his *pro se* brief or seek an extension of time for filing that brief until he had actual access to the appellate record.**

### **ARGUMENT AND AUTHORITIES**

#### **A . Summary of Argument**

Petitioner complains that the 12<sup>th</sup> Court affirmed his conviction before ensuring that he had access to the appellate record to file a *pro se* brief. (Pet. Brief: 7-14). However, this complaint is based upon an incomplete record and disregards that

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<sup>6</sup> For the Court's information, TDCJ officials have explained to the undersigned Assistant CDA that the reason the CD copy of the record was seized from Petitioner was because it was mailed directly to him and not to the unit law library. By policy, inmates are not allowed to possess CDs as they can be easily fashioned into weapons. However, unit law libraries routinely provide inmates with supervised access to computers for *pro se* legal purposes and will assist an inmate in reviewing an electronic appellate record.

Petitioner dropped the ball by failing to file another extension of time for filing his brief or to pursue a paper record by properly filing a motion for one. As discussed above, the record of the 12<sup>th</sup> Court shows that the Court tried several times to obtain a copy of the appellate record for Petitioner. Nevertheless, he waited until the very day his brief was due to request a paper copy of the record and then abandoned any further attempts to extend the time for filing his brief or to properly re-file his rejected request for a paper copy of the record.

## **B. Argument**

In the State's view, the 12<sup>th</sup> Court's actions were consistent with this Court's opinion in *Kelly v. State, supra*. This Court did not hold in *Kelly* that an appellate court must throw out the rulebook whenever an appellant seeks to file a *pro se* brief or to otherwise ignore non-compliance with the rules. Instead, the Court held:

[W]e believe that the courts of appeals also have an on-going responsibility, once an appellant manifests his desire for pro se record access, to officially guide the process and follow through to make sure that such access is granted before they rule on the validity of appointed counsel's *Anders* brief and motion to withdraw.

*Kelly*, 436 S.W.3d at 318.

Here, the 12<sup>th</sup> Court granted Petitioner's motions seeking electronic access to the record. It only denied his motion for a paper copy because it did not show service on its face in violation of the Rules of Appellate Procedure.

The *Kelly* court contemplated that both the appellate court and the appellant's counsel shared in the responsibility to see that a *pro se* appellant had access to the reporter's record. *Kelly*, 436 S.W.3d at 318. However, there is another participant in a criminal appeal - the appellant. Once an appellant makes the decision to sit at the counsel table, he too should rightfully share in the responsibility for obtaining the record. A convicted person no longer enjoys the presumption of innocence, and he is certainly not a *victim* of the criminal justice system.<sup>7</sup>

As is true of any *pro se* appellant, Petitioner was required to comply with the same rules and requirements and was subject to the same risks and pitfalls as a professional attorney. *Williams*, 252 S.W.3d at 356.

On September 10, '2018, Petitioner's court-appointed attorney filed an *Anders* brief. Nearly seven months later, the 12<sup>th</sup> Court affirmed his conviction on April 17, 2019. During the interim, Petitioner filed several motions with each being granted by the 12<sup>th</sup> Court, save one which was on its face not properly serviced. However, Petitioner stopped corresponding with the Court and allowed the time for the filing of his brief to lapse without explanation, without seeking an extension, and without any

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<sup>7</sup> In this case, Petitioner alone made the decision to beat his wife with a baseball bat. Similarly, he decided over the course of his criminal history to not take advantage of the free literacy classes offered to probationers and prison inmates both while in custody or on parole. *See* (13 RR: 13-17, 23-24).

further attempt to secure access of the record. In essence, Petitioner abandoned his appeal when all that was needed to continue the record dialog was to properly file his last request by serving it on the State. After waiting over two months for Petitioner to either properly service his record access motion, file his brief, or seek an extension of time for that filing, the 12<sup>th</sup> Court apparently concluded that Petitioner had lost interest and took the case under submission.

Nevertheless, this Court has decided that the court of appeals, "... must continue to monitor the situation and may not, in any event, rule on the validity of appellate counsel's motion to withdraw and *Anders* brief until it has satisfied itself that the appellant has been able to access the appellate record to prepare his response, in keeping with its order." *Kelly*, 436 S.W.3d at 321-22.

Not explained in *Kelly*, however, is to what extent an appellate court must prod a *pro se* appellant who appears to have become disinterested in obtaining the record and completing his brief. Is a court permitted, after complying with *Kelly*, to reasonably deduce after a period of silence that no *pro se* brief will be forthcoming and take the case under submission? How long does the obligation under *Kelly* continue after an appellant quits communicating with the court? Is an appellate court required under *Kelly* to chase down a now recalcitrant *pro se* appellant in order to adequately "monitor" the situation?

In this case, the 12<sup>th</sup> Court granted Petitioner's motions for an extension of time and for record access until he failed to properly service his last request. At that time, the Court gave petitioner notice of the rules regarding the manner of service. (Pet. Brief: Appendix D). Petitioner's response - silence. A month later, the Court notified him that the case will be submitted in approximately 30 days after the notice. (State's Brief: Appendix D). Petitioner's response - more silence. Finally, after two months of not hearing from Petitioner, and with his brief being over 70 days late, the 12<sup>th</sup> Court issued its opinion.

On the record, there was no error in the 12<sup>th</sup> Court taking the case under submission. Petitioner was directly responsible for his not being able to access a paper copy of the record where he failed to follow-up on his motion for a paper copy and/or to seek an extension of time to do so.

Because the 12<sup>th</sup> Court was not required under *Kelly* to conjoin or intimidate Petitioner into completing the obligation that he took upon himself, there is no merit to his first ground and it should be overruled.

### III. REPLY TO GROUND FOR REVIEW TWO

**The record is unclear whether Petitioner was denied his Due Process and Equal Protection Rights under *Anders v. California* where the 12<sup>th</sup> Court did not "withhold" the appellate record from him until he could pay for it.<sup>8</sup>**

#### ARGUMENT AND AUTHORITIES

##### A . Summary of Argument

Petitioner appears to allege that he was improperly denied a paper copy of the record under *Anders* when the 12<sup>th</sup> Court responded to his request for an electronic copy (CD) by informing him of the cost of a paper copy.

However, Petitioner did not ask for a free paper copy of the record. Instead, he asked for an electronic copy (CD) of the record to send to a family member for them to print it out and to mail that copy to Petitioner. (Pet. Brief: Appendix D). The 12<sup>th</sup> Court responded by telling Petitioner that it could provide a paper copy and the cost involved in making the copy. (Pet. Brief: Appendix E). Once again, Petitioner did not respond the 12<sup>th</sup> Court's initial denial of a paper copy of the record based upon a lack of service. He did not ever ask again for a paper copy.

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<sup>8</sup> Petitioner argued in his PDR that the 12<sup>th</sup> Court violated his rights by informing him of the cost of copying the appellate record when asked for an electronic copy. (PDR: 10-11). This was the issue granted review by the Court. However, Petitioner's brief on the merits instead asks under the second ground "... who is responsible for ensuring that such access [to the record] has occurred?" (Pet. Brief: 15-20). That was not the issue originally granted review and the State will instead respond to the second ground as granted.

## **B. Argument**

Initially, the State would respectfully suggest that Petitioner's second ground is not reviewable by this Court. The 12<sup>th</sup> Court's letter to Petitioner explaining the cost of a paper record is dated June 27, 2019, two months *after* that Court had already affirmed Petitioner's conviction. *See* (Pet. Brief: Appendix E); *Pendergraft*, 2019 Tex. App. LEXIS 3133. Thus, it was not part the 12<sup>th</sup> Court's "decision in a criminal case" to be reviewed as contemplated by Rule 66.1 of the Rules of Appellate Procedure because it did not finally dispose of the case - that had already happened. *See i.e., Jack v. State*, 149 S.W.3d 119, 123 (Tex. Crim. App. 2004) ("by entering an order merely abating an appeal a court of appeals does not 'decide a case.'"). This ground should be denied.

Nevertheless, should the Court desire to review this ground, the record in this case is unclear at best on this issue.<sup>9</sup> It merely shows that two months after the 12<sup>th</sup> Court affirmed his conviction, Petitioner sent a letter to the clerk of the court appearing to request an electronic copy of the appellate record be sent to a family member for them to print out and send him a paper copy. (Pet. Brief: Appendix D)

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<sup>9</sup> All the more reason why this petition should be found to have been improvidently granted and should be remanded back to the 12<sup>th</sup> Court with instructions to withdraw its opinion, and take the necessary measures to ensure that Petitioner has actual access to the appellate record so that he can file a *pro se* brief.

("So our only option in TDCJ as inmates [is] to send these C.D.'s to a friend or family member and have them print the record and mail directly to us. I'm am more than willing to do this."). Apparently taking this to mean that Petitioner now had someone willing to assume the cost of copying the record (or in a complete *non sequitur*), a 12<sup>th</sup> Court deputy clerk informed Petitioner that a paper copy could be sent directly to him with a cost per page totaling \$688.00. (Pet. Brief: Appendix E).

In any event, the 12<sup>th</sup> Court had twice previously ordered the trial court to provide Petitioner access to the appellate record. (1 CR Supp I: 1, 6); (I CR Supp II: 5). The Court later attempted to provide Petitioner the means to obtain a paper copy of the same. (Pet. Brief: Appendix E).

Consequently, Petitioner's assertion that the 12<sup>th</sup> Court "withheld" the record from him in lieu of payment is completely unfounded and without merit. There is no merit to this ground and it should be overruled.

#### IV. REPLY TO GROUND FOR REVIEW THREE

**This Court has already concluded that once counsel files a motion to withdraw and an *Anders* brief, it is counsel's responsibility to provide access of the appellate record to a *pro se* appellant, in order to meaningfully respond to the *Anders* brief.**

#### ARGUMENT AND AUTHORITIES

##### A. Argument

The issue granted review by this Court under Petitioner's third ground was framed by Petitioner as follows:

Once Counsel files a motion to withdraw and an *Ander[s]* brief, should it be Counsel's responsibility to provide access of the appellate record to the Petitioner, in order to meaningfully respond to the *Ander[s]* brief?

(PDR: 11-13).

This Court has clearly stated that there is an ongoing obligation for appellate counsel who has filed an *Anders* brief and motion to withdraw to assist his client "until such time as the court of appeals relieves him of this professional obligation." *Kelly*, 436 S.W.3d at 319. And, until this obligation is complete, counsel must continue to "act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf." *Id.* at 319, *citing* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01 cmt. 6. This Court has concluded further that this obligation includes that counsel must write a letter to (1) notify his client of the motion to

withdraw and the accompanying *Anders* brief, providing him a copy of each, (2) inform him of his right to file a *pro se* response and of his right to review the record preparatory to filing that response, and (3) inform him of his *pro se* right to seek discretionary review should the court of appeals declare his appeal frivolous. To this list the Court added that appointed counsel who files a motion to withdraw and *Anders* brief must also, (4) take concrete measures to initiate and facilitate the process of actuating his client's right to review the appellate record, if that is what his client wishes. *Kelly*, 436 S.W.3d at 319.

Petitioner does not complain about (1) through (3) above and instead has focused on his access to the record as described in (4). In that light, the record shows that his counsel took steps to obtain access to an electronic version (CD) of the record and was successful in that endeavor until the CD was seized at Petitioner's prison unit. Counsel filed the original motion for record access. (State's Brief: Appendix B). He also filed a "Motion to Extend Time to file Appellant's Pro Se Brief," which asserted that, although the trial court sent the record, Petitioner did not receive it. Counsel asked for an order to the trial court to send the record and requested 30 days from receipt of the record to file a *pro se* brief. (Pet. Brief: Appendix C). The 12<sup>th</sup> Court granted that request and ordered the trial court to "ensure that Appellant receives an electronic copy of the appellate record" by December 31, 2018. (1 CR Supp II: 5).

It appears that Petitioner's appellate attorney did not take any additional action after Petitioner informed the 12<sup>th</sup> Court that his CD copy of the record was seized pursuant to TDCJ policy and requested a paper copy. (Pet. Brief: Appendix A). However, it is unclear whether Petitioner's appellate attorney was aware that Petitioner was still without access to the appellate record which had been twice ordered to Petitioner pursuant to counsel's motions. It is also unclear whether counsel was informed by Petitioner that he still wanted or needed access to the record. It is not outside the realm of possibility that Petitioner told counsel that he had no longer wished to pursue a *pro se* brief prior to the 12<sup>th</sup> Court issuing its opinion - because counsel seems to have taken action whenever he was aware that Petitioner still needed access to the record.

If this Court is seeking to issue a more definitive statement about an appellate counsel's obligations under *Anders* than that already found in *Kelly*, it is respectfully submitted that the record here lacks the necessary clarity concerning counsel's knowledge regarding Petitioner's actual access to the appellate record.

For these reasons, the Court should overrule Petitioner's third ground. Alternatively, the Court should find this petition has been improvidently granted and remand the case with orders to withdraw the opinion below until Petitioner has been given actual access to the record and time to file his *pro se* brief.

## **PRAYER**

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the 12<sup>th</sup> Court of Appeals. Alternatively, the State prays that the Court find this petition was improvidently granted and remand the case back to the lower court with orders to withdraw the opinion until Petitioner has been given actual access to the record and time to file his *pro se* brief.

Respectfully submitted,

JACOB PUTMAN  
Smith County Criminal District Attorney

/s/ Michael J. West  
Michael J. West  
Asst. Criminal District Attorney  
Bar I.D. No. 21203300  
100 N. Broadway, 4<sup>th</sup> Fl.  
Tyler, Texas 75702  
(903) 590-1720  
(903) 590-1719 (fax)

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Texas Rule of Appellate Procedure 9.4, the undersigned attorney certifies that the word count for this document is 4,981 words as calculated by Corel WordPerfect X6.

/s/ Michael J. West  
Michael J. West

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6<sup>th</sup> day of February, 2020, the following have been completed:

(1) The original copy of the State's brief on the Merits in the above-numbered cause has been sent via electronic filing to the Clerk of the Court of Criminal Appeals.

(2) A legible copy of the State's Brief on the Merits in the above-numbered cause has been sent via electronic filing to:

Hon. Stacey Soule  
State Prosecuting Attorney  
P.O. Box 12405  
Austin, Texas 78711

Mr. Austin Jackson  
Attorney at Law  
112 East Line Street, Ste. 310  
Tyler, Texas 75702

/s/ Michael J. West  
\_\_\_\_\_  
Michael J. West  
Asst. Criminal District Attorney  
Bar I.D. No. 21203300  
100 N. Broadway, 4th Fl.  
Tyler, Texas 75702  
(903) 590-1720  
(903) 590-1719 (fax)

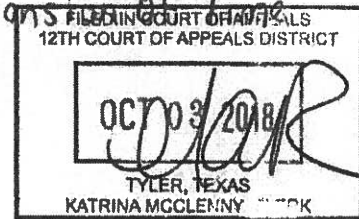
**Appendix A - Appellant Motion for Extension of Time to File a Pro Se Brief**

James Pendergraft  
vs,  
State of Texas

§  
§  
§

In The Court of Appeals  
12th Judicial District  
Tyler, Texas

Appellant Motion For Extension of Time  
To File A Pro Se Brief



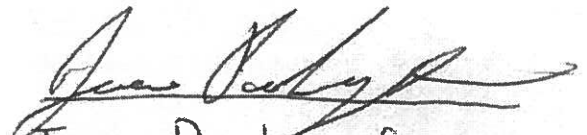
To The Honorable Said Judges of Court:

Comes now, James Pendergraft, pro se, appellant in the above styled and numbered cause, and files his request to extend (60) days to file brief due to his pro se and has not had a chance to review the records in which to meet the due date of September 10, 2018 to October 10, 2018. Appellant will show this Honorable court good cause to grant this motion as follows:

1. Appellant has no records to review to file a brief
2. Appellant is proceeding pro se need adequate time to review, this court deem just.
3. Appellant request is not unreasonable due to the record show appellant has reading ability.

Prayer For Relief

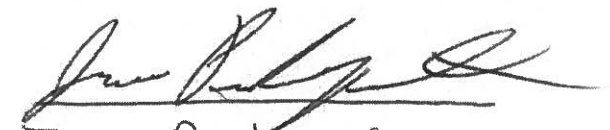
Appellant prays that this Honorable court will grant this motion and extend the deadline to file brief just according to appellant's situation here, and allow appellate proper time to file a brief.

  
James Pondergraft  
2661 Fm 2054  
Tennessee Colony, Tx 75884

### Inmate Declaration

I James Pondergraft, #2193113, being incarcerated in the  
TPCS-CID Coffield Unit in Anderson County, Texas declare that the  
foregoing is true and correct under the penalty of perjury.

Executed this 1 day of October 2018

  
James Pondergraft  
2661 Fm 2054  
Tennessee Colony, Tx 75884

**Appendix B - Appellant's Motion to Obtain Record**



### III. Prayer for Relief

Appellant requests that he be provided a copy of the appellate record in this case, or that this Court remand the matter to the trial court to allow James Pendergraft a copy of the record, and for other such relief as the Court may deem appropriate.

Respectfully submitted,

/s/ James Pendergraft by JWH \_\_\_\_\_

James Pendergraft  
TDCJ No. 02193113  
C/O Gurney Unit  
1385 FM 3328  
Palestine, TX 75803

### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion has been delivered to Michael West, Counsel for the State, at the addresses listed below on this the 8<sup>th</sup> day of October, 2018 by hand delivery or regular mail or the State of Texas electronic filing system.

/s/ James Pendergraft by JWH  
James Pendergraft

Michael West  
Smith County District Attorney's Office  
100 North Broadway, 4<sup>th</sup> Floor  
Tyler, Texas 75702

**Appendix C - December 31, 2018 letter from 12<sup>th</sup> Court to Parties**



CHIEF JUSTICE  
JAMES T. WORTHEN

CLERK  
KATRINA MCCLENNY

JUSTICES  
BRIAN HOYLE  
GREG NEELEY

CHIEF STAFF ATTORNEY  
KERI L. HUNT

## TWELFTH COURT OF APPEALS

December 31, 2018

Mr. James W. Huggler Jr.  
100 East Ferguson  
Suite 805  
Tyler, TX 75702  
\* DELIVERED VIA E-MAIL \*

Mr. Michael J. West  
Asst. District Attorney  
4th Floor, Courthouse  
100 North Broadway  
Tyler, TX 75702  
\* DELIVERED VIA E-MAIL \*

James Ray Pendergraft  
#02193113  
Coffield Unit  
2661 FM 2054  
Tennessee Colony, TX 75884

**RE:** Case Number: 12-18-00091-CR  
Trial Court Case Number: 007-1264-17

**Style:** James Ray Pendergraft  
v.  
The State of Texas

The Judge's notice to this Court advising that an electronic copy of the appellate record was mailed to the Appellant on December 28, 2018, has this day been received and filed in the above styled and numbered case.

The Appellant is advised that in accordance with this Court's order entered on December 21, 2018, the pro se brief of Appellant is due to be filed on or before **January 30, 2019**.

Very truly yours,

By: Katrina McClenny  
Katrina McClenny, Clerk

**Appendix D - March 18, 2019 letter from 12<sup>th</sup> Court to Parties**



CHIEF JUSTICE  
JAMES T. WORTHEN

CLERK  
KATRINA MCCLENNY

JUSTICES  
BRIAN HOYLE  
GREG NEELEY

CHIEF STAFF ATTORNEY  
KERI L. HUNT

## TWELFTH COURT OF APPEALS

March 18, 2019

Mr. James W. Huggler Jr.  
100 East Ferguson  
Suite 805  
Tyler, TX 75702  
\* DELIVERED VIA E-MAIL \*

Mr. Michael J. West  
Asst. District Attorney  
4th Floor, Courthouse  
100 North Broadway  
Tyler, TX 75702  
\* DELIVERED VIA E-MAIL \*

James Ray Pendergraft  
#02193113  
Gurney Unit  
1385 FM 3328  
Palestine, TX 75803

**RE:** Case Number: 12-18-00091-CR  
Trial Court Case Number: 007-1264-17

**Style:** James Ray Pendergraft  
v.  
The State of Texas

Please be advised that the above-referenced case has been set for submission without oral argument on **April 8, 2019**.

You will be notified when an opinion is delivered.

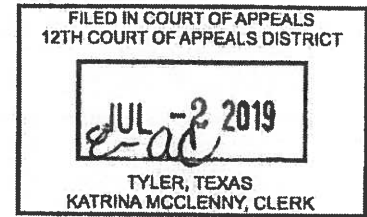
Very truly yours,

By: Katrina McClenny  
Katrina McClenny, Clerk

**Appendix E - June 27, 2019 letter from Petitioner to 12<sup>th</sup> Court**

James Ray Pendergraft  
#02193113 - Coffield  
2661 FM 2054

Tenn. Colony, Tx. 75884-5000



June 27, 2019  
Office of the Clerk  
Twelfth Court of Appeals  
1517 West Front Street, Suite 354  
Tyler, Tx. 75702

RE: James Ray Pendergraft v. State of Texas  
Appeal No. 12-18-00091-CR  
Trial Court No. 007-1264-17

Dear Clerk of the Court:

This Honorable Court has affirmed the judgement of the trial court. However, I do not have a copy of the Ander's Brief and Motion to withdraw that Counsel has filed in this court. If there has been a brief filed by the State, than I do not have that either. Please send the following documents so that I can properly prepare and file my Petition For Discretionary Review in the Court of Criminal Appeals.

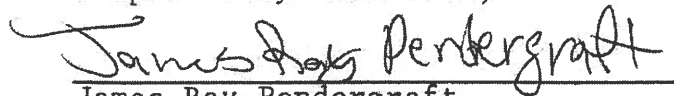
**Notice:** This Unit will not allow inmates to have access to CD's.

The following requested documents are:

1. The Ander's Brief, and motion to withdraw, filed by Counsel, and State's Brief, if any.
2. The Reporter's Record; and,
3. The Clerk's record.

Thank you for all your help and time within this matter.

Respectfully Submitted,

  
James Ray Pendergraft  
Pro se.

CC: File.